Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Virginia Cellular, LLC	)	
	)	CC Docket No. 96-45
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
in the Commonwealth of Virginia	)	

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

In 1996, Congress not only authorized the Commission to engage in a notice-and-comment rulemaking to implement the universal service provisions of §§ 214(e) and 254 of the Communications Act ("Act"), it explicitly empowered the agency to fill gaps in the statute following principles of its own determination. Hence, the Commission was delegated the authority to promulgate "legislative" or "substantive" rules under the Administrative Procedure Act ("APA"). In effect, Congress gave the Commission the interpretative authority to speak with the force of law during its rulemaking to implement the statute when it promulgated rules based on its construction of the ambiguous provisions of §§ 214(e) and 254 of the Act.

The Commission spoke with the force of law when it adopted the statutory criteria contained in § 214(e)(1) as the rules for determining eligibility to be designated as an eligible telecommunications carrier ("ETC"). The Commission construed the ambiguous provisions of § 214(e)(2) to prohibit both it and the states from adopting criteria for designating ETCs in addition to those set out in § 214(e)(1).

Congress employed the language of § 214(e)(2) when it enacted § 214(e)(6) in 1997 to authorize the Commission to designate as ETCs carriers that are not subject to the jurisdiction of a state commission. Once again, the Commission adopted the requirements of § 214(e)(1) as its eligibility criteria for designating ETCs under § 214(e)(6). Although the requirements for ETC designation under § 214(e)(6) were not promulgated in an APA rulemaking, the Commission unquestionably intended that its § 214(e)(6) eligibility requirements be binding legislative rules.

At the request of the Commission, and as required by § 254(a) of the Act, the Federal-State Joint Board on Universal Service ("Joint Board") is conducting a notice-and-comment proceeding to formulate recommended changes in the ETC rules. In particular, the Joint Board asked for comment on what factors the Commission should consider when it performs ETC designations pursuant to § 214(e)(6).

Not waiting for the Joint Board's recommendation, the Commission announced the factors it would consider in making § 214(e)(6) designations and retroactively applied those factors in this case to dispose of the petition of Virginia Cellular, LLC ("Virginia Cellular") for ETC designation. For the first time, the Commission placed a burden of proof on applicants to establish that their designation as ETCs would serve the public interest. It mandated that ETC applicants satisfy a burden of proof to establish their universal service offerings will benefit rural consumers. And it adopted stringent public interest standards under which an ETC applicant for a rural study area must show: (1) the benefits of increased competitive choice; (2) the impact of the designation on the universal service fund; (3) the unique advantages and disadvantages of its service offering; (4) any commitments made regarding quality of telephone service; and (5) its ability to satisfy its obligation to serve the designated service area within a reasonable time frame.

All of the foregoing requirements are new. They substantially change the substance of the Commission's prior requirements for § 214(e)(6) designation, thereby amending a legislative regulation. Yet, no component of the Commission's new "public interest framework" for making ETC designations was adopted by rulemaking at the recommendation of the Joint Board following a notice-and-comment proceeding.

As evidenced by its request that the Joint Board examine the process for designating ETCs, the Commission was aware that substantive changes in the designation process would trigger the APA's notice-and-comment requirements. Nevertheless, the Commission proceeded to significantly change the process. Whatever authority it has to adopt rules in adjudications, the Commission is prohibited from adopting new legislative regulations in this case knowing that the very same regulations are under consideration in an notice-and-comment rulemaking required by §§ 254(a) of the Act and 553 of the APA.

Because it was adopted in violation of the notice-and-comment rulemaking requirements of the Act and the APA, the Commission's public interest framework is invalid and cannot be applied either retroactively in this case, or prospectively in any other case, until promulgated in accordance with law.

The Commission not only circumvented notice-and-comment requirements, it reversed its long-standing construction of § 214(e)(2), and acceded to the Fifth Circuit's interpretation of the statute in *Texas Office of Public Utility Counsel v. FCC* ("*TOPUC*"). After formally construing § 214(e) to prohibit it from imposing service quality obligations as a condition of being designated as an ETC, the Commission has now adopted the *TOPUC* view of the statute and purports to find nothing in § 214(e) that prohibits it from imposing that eligibility condition on Virginia Cellular. Because it was not required to follow the Fifth Circuit's approach to § 214(e)(2) nationwide, the Commission cannot simply acquiesce to *TOPUC*. If it is to adhere to its new view of § 214(e), the Commission must give substantive reasons for its acquiescent interpretation in a reasoned decision.

The Commission also erred by considering the impact an ETC designation will have on the federal Universal Service Fund. The amount of burden that may be placed on the federal universal service mechanism is a decision properly before the Joint Board and one which must be resolved in the ongoing rulemaking. Moreover, consideration of impacts on the federal USF is not competitively neutral because it ignores the much greater increases in the form of support to ILECs, as well as the fact that the introduction of a lower-cost carrier can spur efficiencies that result in diminished needs for support.

Finally, the *Order* incorrectly states that the Commission may revoke Virginia Cellular's ETC status. While states may be able to revoke ETC status, the Commission lacks the requisite statutory authority to do so. Rather, if the Commission deems it necessary, it may seek judicial enforcement, refer the matter for criminal prosecution, or impose a forfeiture penalty.

Accordingly, the Commission is requested to: reconsider its *Order;* rescind its new requirements for ETC designation; decide pending ETC cases under current law; declare that Virginia Cellular's ETC designation is not subject to revocation; hold that the size of the federal USF may not be considered in an individual ETC designation; and grant Virginia Cellular's request to redefine the service area of NTELOS Telephone Inc. in Virginia.

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To: The Commission

PETITION FOR RECONSIDERATION

N.E. Colorado Cellular, Inc., Midwest Wireless Holdings L.L.C., Rural Cellular Corporation, and U.S. Cellular Corporation (collectively, "Petitoners"), by their attorneys, and pursuant to § 405(a) of the Communications Act of 1934 ("Act"), 47 U.S.C. § 405(a), and § 1.106(b)(1) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.106(b)(1), hereby petition the Commission to reconsider its *Memorandum Opinion and Order*, FCC 03-338, released January 22, 2004, in the above-captioned proceeding ("*Order*"). In support thereof, the following is respectfully submitted:

BACKGROUND

In April 2002, Virginia Cellular, LLC ("Virginia Cellular") petitioned the Commission to be designated as an eligible telecommunications carrier ("ETC") throughout its licensed service area in the Commonwealth of Virginia. *See Order* at 6 (¶ 10). Approximately six months later, the Commission asked the Federal-State Joint Board on Universal Service ("Joint Board") to examine the process for designating ETCs. *See Federal-State Joint Board on Universal Service*,

17 FCC Rcd 22642, 22647 (2002) ("*Referral Order*"). Responding to that request in February 2003, the Joint Board solicited public comment on a variety of issues pertaining to that process. *See Joint Board Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and ETC Designation Process*, 18 FCC Rcd 1941, 1954-56 (Joint Bd. 2003) ("*Rulemaking PN*"). In particular, the Joint Board asked for comment on what factors the Commission should consider when it performs ETC designations pursuant to § 214(e)(6) of the Act. *See id.* at 1955.

Not waiting for the Joint Board's recommendation, but professing not to prejudge the issues still before the Board,[1] the Commission announced the factors it would consider in making § 214(e)(6) designations and retroactively applied those factors to dispose of Virginia Cellular's petition for ETC designation. *See Order* at 3, 12-14 (¶¶ 4, 26-28). In the process, the Commission: circumvented the requirements of § 254(a) of the Act and § 553 of the Administrative Procedure Act ("APA"); reversed its long-standing construction of § 214(e)(2) of the Act; acceded to the Fifth Circuit's interpretation of the statute in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*"); and overturned *Cellco Partnership d/b/a Bell Atlantic Mobile*, 16 FCC Rcd 39 (Com. Car. Bur. 2000) and its progeny. *See id.* at 12-13, 22 n.141.

STANDING

Petitioners, their subsidiaries, or affiliates are prosecuting petitions for ETC status before this Commission and/or state commissions, or plan to file petitions for ETC status with this

[1] *See Order* at 7, 14 (¶¶ 12, 28).

Commission, or have petitions pending with this Commission to redefine rural ILEC service areas pursuant to § 54.207 of the Rules.[2] The *Order* changed the process for designating ETCs to make it significantly more difficult for parties seeking ETC status at the FCC to be designated. The Commission enunciated "more stringent" standards for ETC designations in rural telephone company service areas. *Order* at 3 (¶ 4). And it announced that the designation of additional ETCs in areas served by non-rural telephone companies will no longer be found to be *per se* in the public interest. *See id.* at 13 (¶ 27). If the *Order* stands, and is followed by state commissions, Petitioners' interests in obtaining valuable ETC designations will be adversely affected. That should be enough to give them standing under § 405(a) of the Act and 1.106(b)(1) of the Rules.[3]

Petitioners recognize that the precedential effect of an adjudicatory order generally is not enough to meet the "adversely affected" test for non-party standing. *See AT&T Corp. v. Business*

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[2] *See, e.g.*, RCC Minnesota, Inc., Application for Designation as an ETC in Oregon, Docket No. UM 1083 (Or. PUC); U.S. Cellular Corp., Application for Designation as an ETC in Oregon, Docket No. UM 1084 (Or. PUC); *WCB Initiates Proceeding to Consider the Minnesota PUC Petition to Redefine Rural Telephone Company Service Area in the State of Minnesota*, DA 03-3594 (released Nov. 7, 2003); *WCB Initiates Proceeding to consider the Colorado PUC Petition to Redefine the Service Area of Wiggins Tel. Assoc. in Colorado*, 18 FCC Rcd 18595 (WCB 2003).

[3] Petitioners had good reason for not participating earlier in this proceeding. When it solicited comment on Virginia Cellular's petition, the WCB notified the public that among the issues to be decided was whether Virginia Cellular "satisfie[d] all the statutory and regulatory prerequisites for ETC designation." *WCB Seeks Comment on Virginia Cellular LLC Petition for Designation as an ETC in the State of Virginia*, 17 FCC Rcd 8778 (WCB 2002) ("*Comment PN*"). The WCB did not provide notice that the Commission contemplated the adoption of new "regulatory prerequisites to ETC designation" in this proceeding. Petitioners had no reason to comment on the merits of Virginia Cellular's petition. But they may have participated had they been notified that the Commission was re-examining the "framework" of its ETC designation process in this proceeding. *See Order* at 3 (¶ 4). Indeed, Petitioners have actively participated in the Joint Board's ongoing consideration of these matters in CC Docket No. 96-45. They have filed comments, reply comments and made permitted (and disclosed) ex parte presentations to both the Commission and the Joint Board on their own behalf and as members of the Alliance of Rural CMRS Carriers.

Telecom, Inc., 16 FCC Rcd 21750, 21752-53 (2001). However, under the peculiar circumstances of this case, the Commission should find that Petitioners have standing to be heard.

The Commission has refused to grant non-parties standing to seek reconsideration of adjudicatory orders based on the adverse precedential effects for fear that it "would open the 'floodgates' to non-party participation in adjudicatory proceedings, and thus effectively convert every adjudicatory proceeding into a rulemaking proceeding." *Id.* at 21753. Here, the adjudication of Virginia Cellular's petition for ETC designation has already been converted into a quasi-rulemaking proceeding.[4]

Purportedly acting pursuant to §§ 1.415 and 1.419 of the Rules, the Wireline Competition Bureau ("WCB") invited "interested parties" to comment on Virginia Cellular's petition. *See Comment PN*, 17 FCC Rcd at 8779. Obviously, however, §§ 1.415 and 1.419 apply only in rulemaking proceedings after the issuance of the notice of proposed rulemaking. *See* 47 C.F.R. §§ 1.399, 1.415(a). Thus, from the onset, the WCB treated Virginia Cellular's petition for ETC designation as a petition for rulemaking. The Commission did the same at the end when it pronounced:

> While we await a recommended decision from the Joint Board, we acknowledge the need for a more stringent public interest analysis for ETC designations in rural telephone company service areas. The framework enunciated in this Order shall

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[4] An "adjudication" is an "agency process for the formulation of an order." 5 U.S.C. § 551(7). An "order" is defined as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making but including licensing." *Id.* §551(6). "Licensing" includes an "agency process respecting the grant . . . or conditioning of a license." *Id.* §551(9). A "license" in turn is defined to include "the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." *Id.* § 551(8). Thus, the Commission's process for the formulation of its Order permitting Virginia Cellular to be designated as an ETC, subject to certain conditions, was an adjudication.

> apply to all ETC designations for rural areas pending further action by the Commission.[5]

The Commission proceeded to make "statement[s] of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy" pertaining to the ETC designation process. 5 U.S.C. § 551(4). In short, the Commission coopted the Joint Board by issuing rules. *See id.*

Had the Commission changed the ETC designation process by rulemaking, any "interested person" would have had the right to seek reconsideration under § 1.429(a) of the Rules. Petitioners would have been entitled to petition for reconsideration without meeting the "adversely affected" test or showing "good reason" for not participating earlier in the case. *Compare* 47 C.F.R. § 1.429(a) *with id.* §1.106(b)(1). Apropos of the WCB's decision to invite "interested parties" to participate in this case under § 1.415(a), and insofar as it has conducted this proceeding as a rulemaking, the Commission should afford Petitioners standing as if they were interested parties under § 1.429(a). To do so would clearly serve the interests of economy since Petitioners would have standing to challenge the substantive validity of the Commission's new ETC designation "rules" at the time they are applied to them. *See, e.g., NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 141 (D.C. Cir. 2001). Petitioners' objections to the new ETC designation rules should be heard and addressed now at the time of their adoption.

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[5] *Order* at 3 (¶ 4).

ARGUMENT

The purposes of § 405 of the Act are to afford the Commission both the initial opportunity to correct errors in its decision, see *Rogers Radio Communications Services v. FCC*, 593 F.2d 1225, 1229 (D.C. Cir. 1978), and a fair opportunity to pass on legal or factual arguments before they are presented to a reviewing court. *See Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 239 (D.C. Cir. 1997). The Commission is asked to pass on the following matters of law or fact.

I. The New ETC Designation Rules Were Adopted In Violation Of The APA And Are Invalid

The issue to be adjudicated in this case was whether the Commission should exercise its authority under § 214(e)(6) of the Act to designate Virginia Cellular as an ETC in licensed service area in Virginia. *See Comment PN*, 17 FCC Rcd at 8778. This case did not present the issue of how state commissions should designate ETCs under § 214(e)(2). Nevertheless, the Commission did not explicitly confine its decision to deciding the § 214(e)(6) issue under its existing regulations.

As we read the *Order*, the Commission has held that an ETC applicant bares a "burden of proof" to establish that its designation as an ETC in rural *and* non-rural study areas will serve the public interest. *See Order* at 12-13 (¶¶ 26-28). In rural areas, an ETC applicant must carry the burden to prove that "its universal service offering . . . will provide benefits to rural consumers." *Id.* at 12-13 (¶ 26). With respect to non-rural areas, an ETC applicant must satisfy a less "rigorous" standard. *Id.* at 13 (¶ 27). An applicant must demonstrate that "its designation as an ETC in the

study area of . . . non-rural telephone companies is consistent with the public interest, as required by [§] 214(e)(6)." *Id.*

The Commission did not state that its new public interest "framework" would apply only to applications for federal ETC designations under § 214(e)(6). Instead, the Commission stated in broad and mandatory language that the new framework "shall apply to all ETC designations for rural areas pending further action." *Id.* at 3 (¶ 4). Trusting that the Commission was not suggesting that states should apply the federal framework under § 214(e)(2), the issue we raise is whether the Commission's adoption of new requirements for ETC designation violated the notice-and-comment requirements of the APA. Our analysis of the issue begins with a look at the nature of the Commission's formally-adopted and still-effective ETC rules.

A. The ETC Designation Rules Are Legislative

In the Telecommunications Act of 1996 ("1996 Act"), Congress directed the Commission to convene the Joint Board to conduct a notice-and-comment proceeding to recommend changes to the Rules to implement the universal service provisions of §§ 214(e) and 254 of the Act. *See* 47 U.S.C. § 254(a)(1). The Joint Board was given explicit authority to recommend "the definition of the services that are supported by Federal universal service support mechanisms." *Id.*

The 1996 Act mandated that the Commission conduct a rulemaking to implement the recommendations of Joint Board, including the definition of the services that would be supported. *See id.* § 254(a)(2). Congress authorized the Joint Board and the Commission to implement the statute following the universal support principles enumerated in § 254(b) and such other principles that they determine are "necessary and proper" for the protection of the public interest and are

consistent with the 1996 Act. *See* 47 U.S.C. § 254(a)(2); *Referral Order*, 12 FCC Rcd at 90.

The 1996 Act not only authorized the Commission to engage in a notice-and-comment rulemaking to implement the universal service provisions of §§ 214(e) and 254 of the Act, it explicitly empowered the agency to fill gaps in the statute following principles of its own determination. Hence, the Commission was delegated the authority to promulgate "legislative" or "substantive" rules under the APA. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979). As the Supreme Court held in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (footnotes omitted):

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

In effect, Congress gave the Commission the interpretative authority "to speak with the force of law when it addresse[d] ambiguity in the statute or fill[ed] a space in the enacted law." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2002). The Commission exercised that authority when it promulgated its Part 54 universal service rules. *See Federal-State Joint Board on Universal Service, Report and Order,* 12 FCC Rcd 8776 (1997) ("*Universal Service Order*"). As the fruits of a notice-and-comment rulemaking pursuant to a statutory delegation of authority, the Part 54 rules are clearly legislative (or substantive) and therefore have the binding effect of law. *See* Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.3 (3rd ed. 1994).[6]

The Commission spoke with the force of law when it adopted the statutory criteria contained

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[6] The Commission's Part 54 rules meet all the criteria of legislative rules. *See American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109-12 (D.C. Cir. 1993).

in § 214(e)(1) as the rules for determining eligibility to be designated as an ETC. *See Universal Service Order,* 12 FCC Rcd at 8850-51. The Commission construed the ambiguous provisions of § 214(e)(2) to prohibit both it and the states from adopting criteria for designating ETCs in addition to those set out in § 214(e)(1). *See Universal Service Order*, 12 FCC Rcd at 8851. The Commission explained:

> Read together, we find that these provisions dictate that a state commission must designate a common carrier as an [ETC] if it determines that the carrier has met the requirements of section 214(e)(1). Consistent with the Joint Board's finding, the discretion afforded a state commission under section 214(e)(2) is the discretion to decline to designate more than one [ETC] in an area that is served by a rural telephone company; in that context, the state commission must determine whether the designation of an additional [ETC] is in the public interest. The statute does not permit this Commission or a state commission to supplement the section 214(e)(1) criteria that govern a carrier's eligibility to receive federal universal service support.[7]

The Commission construed § 214(e)(2) to achieve Congress's goal of "opening up all telecommunications markets to competition."[8] For example, the Commission held that the imposition of additional obligations on competitive carriers as a condition of ETC eligibility would "chill competitive entry into high cost areas."[9] In a similar vein, it held that a state's refusal to designate an additional ETC on grounds other that the § 214(e) criteria could "prohibit or have the effect of prohibiting the ability of any entity" to provide a telecommunications service in violation of § 253 of the Act.[10]

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[7] *Universal Service Order*, 12 FCC Rcd at 8852 (footnotes omitted).

[8] *Id.* at 8781. The Commission "intended to encourage the development of competition in all telecommunications markets." *Id.* at 8782.

[9] *Id.* at 8858 (quoting *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 87, 170 (Joint Bd. 1996)).

[10] *Id.* at 8852 (quoting 47 U.S.C. § 253(b)).

Because the Commission's interpretation of the ambiguous provisions of § 214(e) was authorized by Congress, and consistent with the "pro-competitive" mandate of the 1996 Act,[11] that construction of the statute had the effect of law and is entitled to *Chevron* step-two deference.[12] *See Mead*, 533 U.S. at 229-30. The Commission's construction and implementation of § 214(e) was published in the Federal Register, *see* 62 Fed. Reg. 32,862 (Jan. 17, 1997), and codified in § 54.201 of the Rules. *See* 47 C.F.R. § 54.201(a)-(d). Because it is a binding rule that affects a carrier's right to obtain universal service support, the § 54.201 ETC eligibility rule is legislative (or substantive) under the APA. *See, e.g., Chrysler*, 441 U.S. at 301-03.

Congress employed the language of § 214(e)(2) when it enacted § 214(e)(6) in 1997 to authorize the Commission to designate as ETCs carriers that are not subject to the jurisdiction of a state commission. *Compare* 47 U.S.C. § 214(e)(2) *with id.* § 214(e)(6). Having already construed the language of § 214(e)(2) to prohibit it from supplementing the § 214(e)(1) eligibility criteria, the Commission adopted the requirements of § 214(e)(1) as its eligibility criteria for designating ETCs under § 214(e)(6). *See Procedures for FCC Designation of ETCs Pursuant to Section 214(e)(6) of the Act*, 12 FCC Rcd 22947, 22948-49 (1997) ("*Section 214(e)(6) PN*").

Although the requirements for ETC designation under § 214(e)(6) were not promulgated in an APA rulemaking, they were clearly a contemporaneous outgrowth of the universal service rulemaking. The Commission adopted its § 214(e)(6) ETC requirements on an expedited basis in order to go into effect with the Part 54 rules (thereby correcting the congressional "oversight" in

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[11] *Id.* at 8781.

[12] *See Chevron*, 467 U.S. at 843-44; *TOPUC*, 183 F.3d at 409-10.

failing to include § 214(e)(6) in the 1996 Act). *See Section 214(e)(6) PN,* 12 FCC Rcd at 22950 n.14. Because those requirements mirrored the ETC eligibility rule adopted in the just-completed notice-and-comment proceeding, their promulgation satisfied the requirements of the APA. *See generally American Mining Congress v. United States EPA*, 907 F.2d 1179, 1182 (D.C. Cir. 1990).

The Commission unquestionably intended that its § 214(e)(6) eligibility requirements be binding legislative rules. For example it made the requirements "effective upon publication in the Federal Register." *Section 214(e)(6) PN,* 12 FCC Rcd at 22950. Formal Commission policy statements that have "general applicability and legal effect" are published in the Federal Register. *See* 47 C.F.R. § 0.445(d). Therefore, by making its § 214(e)(6) requirements "effective" upon such publication, the Commission showed that its requirements were intended to be binding legislative rules. *See American Mining Congress*, 995 F.2d at 1109, 1112. And the Commission enforced its requirements as binding upon Virginia Cellular. *See Order* at 4, 7 (¶¶ 7, 12).

B. The Commission Violated The APA

The APA provides that when an agency proposes to promulgate a legislative (or substantive) rule, it must give notice to interested parties and allow them an opportunity to comment on the proposed rule. *See* 5 U.S.C. § 553(b)-(c).[13] The APA further requires an agency to incorporate in the rules it adopts "a concise general statement of their basis and purpose." *Id.* § 553(c). Finally, a substantive rule most be published thirty days before its effective date. *See id.* § 553(d). Failure

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[13] "[A] substantive rule modifies or adds to a legal norm based on the agency's own authority. That authority flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking. And, it is because the agency is engaged in lawmaking that the APA requires it to comply with notice and comment." *Syncor International Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997).

to follow the notice-and-comment procedures of the APA is grounds for invalidating the rule. *See National Organization of Veterans' Advocates v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001).[14]

An APA rulemaking is required when an agency adopts "a new position inconsistent with any . . . existing regulation." *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995). Certainly, "new rules that work substantive changes in prior regulations are subject to the APA's procedures." *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). Thus, it has become a "maxim of administrative law" that "if a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative." *Id.* (quoting *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)) (brackets omitted). Under that maxim, the Commission's new requirements for ETC designation were subject to an APA rulemaking because they amount to an amendment of existing legislative regulations.

When it adopted its current requirements for requesting ETC designation under § 214(e)(6), the Commission did not require an ETC petitioner to demonstrate that a requested designation would be consistent with the public interest. *See Section 214(e)(6) PN*, 12 FCC Rcd at 22948-49. *See also Order* at 4 (¶ 7) (listing five requirements for § 214(e)(6) ETC designation). Having required no public interest showing, the Commission obviously did not place a burden of proof on an applicant to establish that its designation as an ETC would serve the public interest. *See Section 214(e)(6) PN*,

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[14] Agencies need not comply with the APA notice-and-comment requirements in certain instances, but not "when notice . . . is required by statute." 5 U.S.C. § 553(b). Notice and opportunity to comment appears to be required before any ETC rules are recommended by the Joint Board and adopted by the Commission. *See* 47 U.S.C. § 254(a).

12 FCC Rcd at 22948-49. Nor did the Commission mandate that an ETC applicant satisfy a burden of proof to establish that its universal service offering will benefit rural consumers. *See id.* Nor, finally, did it adopt "stringent public interest" standards under which an ETC applicant for a rural study area must show:

> [1] the benefits of increased competitive choice, the impact of the designation on the universal service fund, [2] the unique advantages and disadvantages of the competitor's service offering, [3] any commitments made regarding quality of telephone service, and [4] the competitive ETC's ability to satisfy its obligation to serve the designated service area within a reasonable time frame.

Order at 13-14 (¶ 28).

All of the foregoing requirements are new. They substantially change the substance of the Commission's prior requirements for § 214(e)(6) designation, thereby amending a legislative regulation. Moreover, by imposing requirements that will "affect subsequent [Commission] acts" and have a "future effect" on ETC applicants, *see Sprint*, 315 F.3d at 373, the Commission has promulgated a "fundamentally new regulation." *Syncor*, 127 F.3d at 95. Yet, no component of the Commission's new "public interest framework" for making ETC designations was adopted by rulemaking at the recommendation of the Joint Board following a notice-and-comment proceeding.

As evidenced by its request that the Joint Board examine the process for designating ETCs, *see Referral Order*, 17 FCC Rcd at 22642, the Commission was aware that substantive changes in the designation process would trigger the APA's notice-and-comment requirements. Moreover, the Commission knew that the APA's requirements had been triggered with respect to the factors it should consider when it performs ETC designations under § 214(e)(6). *See Rulemaking PN*, 18 FCC Rcd at 1955. *See also Order* at 14 (¶ 28). Whatever authority it has to adopt rules in adjudications,

the Commission is prohibited from adopting new legislative regulations in this case knowing that the very same regulations are under consideration in an notice-and-comment rulemaking required by §§ 254(a) of the Act and 553 of the APA.

Because it was adopted in violation of the notice-and-comment rulemaking requirements of the Act and the APA,[15] the Commission's public interest framework is invalid and cannot be applied either retroactively in this case, or prospectively in any other case, until promulgated in accordance with law. *See Sprint*, 315 F.3d at 377 (case remanded for Commission's "utter failure" to follow notice-and-comment procedures). The Commission's new regulation should be set aside. *See Syncor*, 127 F.3d at 96 (case remanded with instructions to vacate rule adopted without notice and comment); *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1236 (D.C. Cir. 1994) (rule set aside for violating notice-and-comment requirements).

II. The Commission Gave No Reasoned Explanation For Repudiating Its Prior Construction Of § 214(e) Of The Act

In 1997, the Commission read the language of § 214(e)(1) and (e)(2) to forbid it or state commissions from supplementing the §214(e)(1) criteria governing a carrier's eligibility to be designated as an ETC. *See supra* p. 9 (quoting *Universal Service Order*, 12 FCC Rcd at 8852). Proposals to impose pricing, marketing, service provisioning, and service quality obligations as a condition of being designated an ETC were rejected, "because [§] 214(e) does not grant the

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[15] The *Order* violates APA requirements in other significant respects. The APA requires that, after considering the comments filed, the Commission "shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). This language contemplates that the basis and purpose statement will accompany publication of the rule. *See Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 799 (D.C. Cir. 1983). In this case, the Commission stated the basis and purpose of its new requirements *before* the Joint Board considered the comments filed. Moreover, the APA requires the Commission to publish a substantive rule at least 40 days before its effective date. *See* 5 U.S.C. § 553(d). *See also* 47 C.F.R. § 1.427(a). The *Order* was "effective immediately" upon its release. *See Order* at 22 (¶ 45). *See also* 47 C.F.R. § § 1.4(b), 1.103(a).

Commission authority to impose additional eligibility criteria." *Universal Service Order*, 12 FCC Rcd at 8856.

The Commission defended its interpretation of the statute before the Fifth Circuit in *TOPUC*. With respect to a carrier seeking federal universal service support in non-rural service areas that satisfies the § 214(e)(1) criteria, the Commission argued that a state commission "*must* designate it as eligible" and "may not impose additional eligibility requirements." *TOPUC*, 183 F.3d at 417 (emphasis in original). Although claiming to review the Commission's interpretation of § 214(e) under the *Chevron* standards, *see TOPUC*, 183 F.3d at 409-10, the Fifth Circuit erroneously afforded the Commission no deference under *Chevron* step-two. Finding that "nothing in [§ 214(e)] prohibits the states from imposing their own eligibility requirements," which confirmed the statute's ambiguity, the court nevertheless rejected the Commission's interpretation in favor of a "reading" of § 214(e) that "makes sense in light of the states' historical role in ensuring service quality standards for local service." *Id.* at 418.

In this case, the Commission acquiesced to the *TOPUC* Court's wrongheaded interpretation of the statute:

> In TOPUC . . . the Fifth Circuit held that nothing in [§] 214(e)(2) prohibits states from imposing additional eligibility conditions on ETCs as part of their designation process. Consistent with this holding, we find that nothing in [§] 214(e)(6) prohibits the Commission from imposing additional conditions on ETCs when such designations fall under our jurisdiction.[16]

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[16] *Order* at 22 n.141. The Fifth Circuit acknowledged that *Chevron* step-two deference was due the FCC where the 1996 Act was "silent or ambiguous." *See TOPUC*, 183 F.3d at 409. After finding that § 214(e) did not unambiguously speak to whether the FCC may prohibit state commissions from imposing additional criteria on ETCs, the court should have upheld the FCC's construction of § 214(e) if it was based on a "permissible construction of the statute," and reversed the agency only if its construction was "arbitrary, capricious or manifestly contrary to the statute." *Id.* (quoting *Chevron*, 467 U.S. at 843, 844). Instead, the court reversed the Commission simply because the plain language of § 214(e) does not prohibit the states from imposing ETC eligibility standards. *See id.* at 418. It did not hold that the FCC filled the "gap" in § 214(e) with a rule that was "manifestly contrary" to

On the "strength" of *TOPUC*, the Commission jettisoned the interpretation of § 214(e) that it formally adopted in its *Universal Service Order*. It now finds nothing in § 214(e)(6), which employs statutory language virtually identical to § 214(e)(2), to prohibit it from supplementing the § 214(e)(1) eligibility criteria. Therefore, the Commission announced that henceforth the designation of an additional ETC in an area served by a non-rural telephone company will not necessarily be based merely "upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of [§] 214(e)(1) of the Act." *Order* at 13 (¶ 27). Indeed, the Commission concluded that the "public interest requirements for non-rural areas" were satisfied in this case "based on the detailed commitments Virginia Cellular made to ensure that it provides high quality service throughout the proposed rural and non-rural service areas." *Id.*

When once it construed § 214(e) to prohibit it from imposing service quality obligations as a condition of being designated as an ETC, the Commission now purports to find nothing in § 214(e) that prohibits it from imposing that "eligibility condition" on Virginia Cellular. The Commission has not only "repudiated" its construction of the statute in the *Universal Service Order*, it has taken a position that is "irreconcilable" with its previously held view of § 214(e). And the Commission takes that position at a time it claims to be undecided on the matter.

When the Commission announced its acquiescence to *TOPUC*, the Joint Board was studying "the impact of the Fifth Circuit's decision regarding the Commission's ability to prohibit states from imposing additional eligibility criteria on ETCs," *Rulemaking PN*, 18 FCC Rcd at 1955, and doing

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the 1996 Act. Instead, the court simply construed the statute in a way that made "sense" to it. *See id.* The *TOPUC* Court has been correctly criticized for not affording the FCC *Chevron* step-two deference in *TOPUC*. *See Comsat Corp. v. FCC*, 250 F.3d 931, 940 (5th Cir. 2001) (Pogue, J., concurring).

so at the Commission's request. *See Referral Order*, 17 FCC Rcd at 22647 n.15. Considering that the impact of *TOPUC* on the Commission's interpretation of § 214(e) adopted in the *Universal Service Order* is being considered in a rulemaking, it was incumbent on the Commission to provide a reasoned explanation for its adoption of the *TOPUC* interpretation. Simply professing deference to the Fifth Circuit's reading of § 214(e) does not suffice as the Commission's reasoned judgment as to the meaning of the statute. *See Holland v. National Mining Ass'n*, 309 F.3d 808, 816-19 (D.C. Cir. 2002).

Because there is no "nonmutual collateral estoppel" against the Government, a single circuit court cannot determine the meaning of an ambiguous statute for the entire nation by imposing an interpretation that the agency must follow outside of the court's jurisdiction. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984). For that reason, the Commission is not required to follow the Fifth Circuit's approach to § 214(e)(2) nationwide. *See Holland,* 309 F.3d at 810. Moreover, the Fifth Circuit construed § 214(e)(2) in light of the "states' historical role" in maintaining service quality standards for local service, a consideration that does not bear on the Commission's authority under § 214(e)(6). Therefore, the Commission cannot simply acquiesce to *TOPUC*. If it is to adhere to its new view of § 214(e), the Commission must give substantive reasons for its acquiescent interpretation in a reasoned decision. *See id.* at 817-18.

III. The Commission's New Interpretation Of § 214(e) Is Manifestly Contrary To The Act

Because Virginia Cellular met the public interest test for the areas served by rural telephone companies, the Commission did not reach the question as to what public interest test should be applied in non-rural areas, if any. Section 214(e)(6) could not be more clear:

> Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, *and shall, in the case of all other areas*, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1).[17]

Congress intended for all carriers who meet the requirements of § 214(e)(1) to be designated as competitive ETCs. This is precisely why Congress set out a separate requirement for competitive ETCs applying in rural areas. Any interpretation of the statute which implies a public interest test is to apply to petitions in non-rural areas renders the statute nonsensical.

The language, "upon request and consistent with the public interest, convenience and necessity" at the beginning of § 214(e)(6) merely states Congress' finding that it *is consistent with the public interest* to designate more than one common carrier as an ETC. It does not compel a separate public interest finding in non-rural areas. To the best of Petitioners' knowledge, only one state has attempted to apply a public interest test to areas served by non-rural telephone companies, and that case has not been tested in court.[18] Every other state that has considered the matter under § 214(e)(2) has either followed the Commission's prior pronouncements or has concluded on its own that a state must designate a carrier that meets the requirements set forth in § 214(e)(1).

The Commission's interpretation of § 214(e)(6) is erroneous and must be reversed.

IV. The Commission Cannot Consider The Impact An ETC Designation Will Have On The Federal Universal Service Fund

The Commission's decision to consider the impact of an ETC designation on the universal

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[17] 47 U.S.C. § 214(e)(6) (emphasis added).

[18] In re: Designation of Eligible Telecommunications Carriers Under the Telecommunications Act of 1996 (In re: RCC Atlantic, Inc. d/b/a Unicel), Docket No. 5918 (Vermont Pub. Serv. Bd. Nov. 14, 2003).

service fund is arbitrary and not competitively neutral.[19] It is arbitrary because such a consideration has no place in an individual ETC designation proceeding. The amount of burden that may be placed on the federal universal service mechanism is a decision properly before the Joint Board and one which must be resolved in the ongoing rulemaking. The Commission acknowledged as much in the *Order*.[20] There is no way for any individual designation to significantly burden a fund that is now over $3 billion.

The decision is arbitrary, but it is also not competitively neutral: Rural ILECs currently draw well over 90% of the high-cost support that is allocated to rural areas. While expressing concern about growth due to CETC designations, the Commission has yet to express any concern that mature networks operated by rural ILECs, growing at a very slow rate, or in some cases contracting, require over six hundred million dollars more support *per year* than they did just four years ago![21] When rural ILECs were designated as ETCs, no state questioned whether the size of the fund would be affected by their designation.

This Commission has previously stated that it would have problems with processes for designating competitive ETCs that are more onerous than those applied to ILECs.[22] If the

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[19] *Order* at 13 (¶ 28).

[20] *Id.*

[21] *See* Reply Comments of the Ad Hoc Telecommunications Users Committee, RM 10822, CC Docket No. 96-45, filed February 13, 2004, at Attachment A.

[22] *See Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling,* 15 FCC Rcd 15168, 15177 (2000) ("*South Dakota Preemption Order*"). *See also Universal Service Order*, 12 FCC Rcd at 8858 ("We find that . . . the imposition of additional eligibility criteria would chill competitive entry into high cost areas. . . and conclude that the imposition of additional criteria, to the extent that they would preclude some carriers from being

Commission is to maintain its core policy of competitive neutrality, then the potential increase in the size of the fund as a result of any individual designation must not be considered.

From a very practical perspective, the Commission's decision is arbitrary because in Virginia Cellular, and many other new CETCs, the Commission has young and aggressive companies that are investing high-cost support dollars into rural America to improve telecommunications infrastructure and advance universal service. Consumers are already seeing benefits from many competitive ETCs who have improved their facilities in rural areas.

Previously, the Commission has recognized that it is in the public interest to encourage a lower-cost provider to enter as an ETC, thus providing an incentive for the incumbent to improve its service, cut costs, and become more efficient. *See Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota,* 16 FCC Rcd 18133, 181378-39 (2001) ("*Pine Ridge*"). In so doing, the size of the high-cost fund is going to have to increase, to give the lower-cost provider an opportunity to improve its infrastructure while support continues to flow to the incumbent. This is precisely why the Commission ruled in the 2001 *RTF Order* that support to incumbents would not be decreased as a result of competitive entry until 2006 at the earliest.[23] This transition period, which gives incumbents an opportunity to prepare for competition in many rural areas, is going to be when the fund increases. But as more efficient carriers drive out inefficient carriers, the fund will stabilize and consumers will

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designated eligible pursuant to section 214(e), would violate the principle of competitive neutrality.") (internal quotations omitted).

[23] *Federal-State Joint Board on Universal Service, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244, 11309 (2001) ("*RTF Order*").

benefit from construction of additional facilities in many rural areas.

This action is arbitrary and not competitively neutral. It violates the Fifth Circuit's holding in *Alenco Communications, Inc. v. FCC* that:

> The Act does *not* guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*.

201 F.3d 608, 620 (5th Cir. 2000) (emphasis in original).

The Commission must remove this factor from consideration in ETC designation proceedings.

V. The Commission's Assignment of the Burden of Proof Violates § 214(e)(6) And Constitutes An Unexplained Departure From Precedent

Without citing any authority, the Commission stated, "In determining whether the public interest is served, the Commission places the burden of proof upon the ETC applicant." *Order* at 12 (¶ 26). We have been unable to locate any other ETC designation case where the Commission has placed the burden of proof on a petitioner with respect to the public interest.

Section 214(c)(6), which governs grants of ETC status by the FCC where a state does not take jurisdiction, states:

> Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the

Commission *shall find* that the designation is in the public interest.[24]

Congress did not allocate the burden of proof to petitioners seeking ETC status. Until now, the Commission and every state that Petitioners have studied have not placed the burden of proof on petitioners. The Commission has consistently ruled that a petitioner has the burden of making a threshold showing that a grant would be in the public interest, which burden may be rebutted. For example, in *RCC Holdings, Inc.*, the Commission ruled:

> We conclude that RCC Holdings has made a threshold demonstration that its service offering fulfills several of the underlying federal policies favoring competition and the provision of affordable telecommunications service to consumers.

RCC Holdings, Inc., 17 FCC Rcd 23532, 23540 (2002).[25]

States following the statute have ruled similarly:

> The FCC has typically analyzed the public interest factor by examining whether consumers are likely to benefit from increased competition; whether designation of an ETC will provide benefits not available from incumbent carriers; and whether consumers would be harmed should the incumbent carrier exercise its option to relinquish its ETC designation under § 214(e)(4).[26]

and

> In weighing the public interest, the Commission is mindful of the stated purpose of the Act, which is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new technologies." In addition, the Commission also will consider our state policies set forth at RCW 80.36.300.

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[24] 47 U.S.C. § 214(e)(6) (emphasis added).

[25] *See also Cellular South License, Inc.*, 17 FCC Rcd 24393, 24402 (2002); *Guam Cellular and Paging, Inc. d/b/a Guamcell Communications*, 17 FCC Rcd 1502, 1508 (2002); *Pine Ridge*, 16 FCC Rcd at 18138-39; *Western Wireless Corp.*, 16 FCC Rcd 48, 55 (2000), *Order on Reconsideration*, 16 FCC Rcd 19144 (2001).

[26] Midwest Wireless Communications, LLC, OAH Docket No. 3-2500-14980-2, PUC Docket No. PT6153/AM-02-686, Findings of Fact, Conclusions of Law, and Recommendation at ¶ 33 (Minn. ALJ Dec. 31, 2002) ("Midwest Minnesota ALJ Decision").

> Consistent with the national and state policies, the Commission will consider the relative benefits and burdens that additional ETC designation may bring to consumers as a whole.[27]

The Commission's failure to explain why it has changed the law that until now, has assigned petitioners the burden of making a threshold showing which can be rebutted, is arbitrary.[28] Moreover, since many states have for a number of years now followed the FCC's lead on this issue, the Commission's ruling could change the manner in which decisions will be made, many in mid-stream.

The Commission should correct its ruling to state that a petitioner seeking ETC status must make a threshold showing why a grant would serve the public interest, which showing may be rebutted.

VI. The Commission Lacks Statutory Authority To Revoke an ETC Designation

In the *South Dakota Preemption Order*, 15 FCC Rcd at 15174, the Commission noted a "state commission may revoke a carrier's ETC designation if the carrier fails to comply with the ETC eligibility criteria." Citing that order, the Commission now claims that it has the authority to revoke Virginia Cellular's ETC designation if it fails to fulfill the requirements of the Act, the Rules, and the terms of the *Order* after it begins receiving universal service support. *See Order* at 23 (¶ 46). We beg to differ.

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[27] RCC Minnesota, Inc., Docket No. UT-023033 (Wash. Util. and Trans. Comm. 2002).

[28] *See AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001) ("no matter how reasonable it may be for the FCC to require market share data before evaluating an incumbent local exchange carrier's market power, it is not reasonable for the Commission to announce such a policy without providing a satisfactory explanation for embarking on this course when it has not followed such a policy in the past. The FCC "cannot silently depart from previous policies or ignore precedent" as it has done here.")

A state commission may have the authority under state law to revoke an ETC designation that was issued pursuant to § 214(e)(2) of the Act. That does not mean the Commission has the same authority with respect to its designation of Virginia Cellular as an ETC under § 214(e)(6). Unlike a state agency, the Commission is fully subject to the APA, which limits the power of an administrative agency to impose sanctions for statutory violations. *See Zola v. ICC*, 889 F.2d 508, 515 (3d Cir. 1989).

Under the APA, a "'sanction' includes the whole or a part of an agency . . . requirement, revocation, or suspension of a license." 5 U.S.C. § 551(9)(F). Clearly, the Commission's designation of Virginia Cellular as an ETC constitutes a license under the APA's "extremely broad" definition. *Air North America v. Dep't of Transp.*, 937 F.2d 1427, 1437 (9th Cir. 1991).

Only a designated ETC is "eligible to receive specific Federal universal service support." 47 U.S.C. § 254(e). Before designating an ETC for rural study areas, the Commission must find that the designation is "consistent with the public interest and necessity." *See id.* § 214(e)(6). The Commission made that finding when it granted an ETC designation to Virginia Cellular for rural study areas. *See Order* at 13 (¶28). The designation is equivalent to a certificate of public convenience and necessity which has been found to be a "license" under the APA's definition.[29] It is "part of an agency permit, certificate, approval . . . or other form of permission" that allows Virginia Cellular to receive universal service support. 5 U.S.C. § 551(8).

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[29] *See Air North America*, 937 F.2d at 1437 (certificate of public convenience and necessity issued by DOT authorizing air operations was an APA "license," although it did not authorize air carrier to fly); *Bullwinkel v. Dep't of Transp.*, 787 F.2d 254, 255-56 (7th Cir. 1886) (airman medical certificates issued by FAA, and necessary to exercise privileges of pilot certificates, were APA "licenses"); *National Cable TV Ass'n, Inc. v. FCC*, 554 F.2d 1094, 1102 n.32 (D.C. Cir. 1976) (cable television certificates of compliance meet the definition of "license").

The APA provides that "[a] sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). Moreover, the APA requires an express grant of statutory authority for an agency to impose a sanction. *See American Bus Ass'n v. Slater*, 231 F.3d 1, 6 (D.C. Cir. 2000). Nothing in the Act, nor any other statute, expressly authorizes the Commission to revoke an ETC designation.[30]

The Commission looks to § 254(e) of the Act for its authority to revoke Virginia Cellular's ETC designation. *See Order* at 23 n.143. However, § 254(e) provides that: (1) only a designated ETC shall be eligible to receive universal service support; and (2) an ETC "shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e). Congress expressly authorized sanctions for noncompliance with other requirements of § 254, but it authorized no sanction for noncompliance with § 254(e). *Compare id.* § 254(e) *with* § 254(h)(5)(F), (6)(F). And it certainly did not authorize the revocation of an ETC designation.

If Virginia Cellular fails to comply with the Act, the Rules, or the *Order*, the Commission is authorized to seek judicial enforcement, *see id.* § 401, refer the matter for criminal prosecution, *see id.* §§ 501, 502, or impose a forfeiture penalty. *See id.* § 503. However, absent statutory authorization, it cannot revoke Virginia Cellular's ETC designation. *See American Bus*, 231 F.3d at 6-7.

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[30] The Commission is expressly authorized to revoke a station license or construction permit. *See* 47 U.S.C. § 312(a). An ETC designation does not fall with the statutory definition of "station license." *See id.* § 153(42).

REQUEST FOR RELIEF

For all the foregoing reasons, Petitioners request that the Commission: reconsider its *Order;* rescind its new requirements for ETC designation; decide pending ETC cases under current law; declare that Virginia Cellular's ETC designation is not subject to revocation; hold that the size of the federal USF may not be properly considered in an individual ETC designation; and grant Virginia Cellular's request to redefine the service area of NTELOS Telephone Inc. in Virginia.

Respectfully submitted,

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February 23, 2004

CERTIFICATE OF SERVICE

I, Janelle Wood, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 23rd day of February, 2004, placed in the United States mail, first-class postage, prepaid, a copy of the foregoing *PETITION FOR RECONSIDERATION* filed today to the following:

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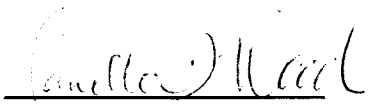

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